

24668

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
24668-S76LJ BY CHARLES D. HAMMELL)

On September 18, 1981, a Proposal for Decision was issued in this matter. That proposal received objection from Objector Charles Carda, but said Proposal for Decision was already amended in substantial conformity with these objections by the Hearing Examiner on September 23, 1981. This Proposal for Decision, together with the amendment made thereto, are expressly incorporated herein.

WHEREFORE, in accordance with the Proposal for Decision and the amendments made thereto, the following Final Order is hereby issued.

Subject to the terms, restrictions, and limitations described below, Application for Beneficial Water Use Permit No. 24668-S76LJ is hereby granted to Charles Hammell to appropriate 35 gallons per minute up to 10 acre-feet per year for new sprinkler irrigation of five (5) acres more or less located in Section 36, Township 30 North, Range 23 West, all in Flathead County, and up to one-tenth (0.1) of an acre-foot for

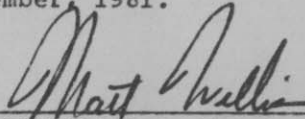
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- (E) The Permittee shall proceed with reasonable diligence in the completion of his appropriation as provided herein.
- (F) The Department (in the exercise of reasonable discretion) may require the Permittee to install metering devices on his pumps so that the rate and volume of water withdrawn pursuant to this permit may be measured. The Department may also require the Permittee to compile and maintain written records of the measurements of his diversion.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 17th day of December, 1981.



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962



Gary Fritz, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 2872

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 24668-s76LJ BY CHARLES D. HAMMELL)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Kalispell, Montana, on September 9, 1981. The Applicant appeared personally. Charles and Maria Carda appeared as Objectors. The Department of Natural Resources and Conservation was represented at the hearing by Charles Brasen, Area Office Supervisor for the Kalispell field office, and Jim Rehbein, also an employee of that office.

STATEMENT OF THE CASE

On September 25, 1979, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by Charles D. Hammell. This application seeks 160 gallons per minute up to 55 acre-feet for new sprinkler irrigation from April 15 to October 15, inclusive, of each year. The Application also seeks .1 acre-feet for stock watering purposes continuously throughout the year. The proposed place of use is 22 acres more or less located in the SW1/4 of Section 30,

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Township 30 North, Range 23 West, all in Flathead County. The proposed point of diversion is in the NE1/4 SW1/4 SW1/4 of Section 36, Township 30 North, Range 23 West. The source of supply is alleged to be Lost Creek, a tributary of Lore Lake.

The pertinent portions of the Application were duly published for three (3) successive weeks in the Daily Inter Lake, a newspaper of general circulation printed and published in Kalispell, Montana.

An objection to the granting of this Application was filed with the Department by Charles and Maria Carda. This objection alleges generally that the flow of Little Lost Creek is insufficient to satisfy these Objectors' claimed water rights, and that therefore there is no unappropriated water available for the Applicant.

On January 2, 1980, an objection to the granting of this Application was filed with the Department by Walter and Delores Stickney. These Objectors set forth and claim generally the existence of certain water rights, and implicitly allege that there is insufficient unappropriated water for the proposed use. The Stickneys did not appear either personally or by representative at the hearing in this matter.

On December 20, 1979, an objection to the granting of this Application was filed with the Department by George and Bernice Long. These Objectors allege that Applicant's claimed appropriation would seriously decrease stream flow and that any animals that might be corralled on this stream will cause pollution of the source of supply. These Objectors did not

appear either personally or by representative at the hearing in this matter.

On November 23, 1979, an objection to the granting of this Application was filed with the Department on behalf of the Montana Power Company. This objection alleges that the proposed appropriation is upstream from the Kerr and Thompson Falls dams and that there is insufficient unappropriated water available for the proposed use without adversely affecting the downstream water rights of the Montana Power Company and other senior appropriators. The Montana Power Company did not appear at the hearing in this matter.

EXHIBITS

The Objectors Carda offered into the record twelve (12) exhibits, to-wit:

- (1) A portion of an aerial photograph upon which has been bordered in yellow the property owned by the Objectors Carda, together with representations of their diversion means.
- (2) Copies of statements of claim of existing rights executed by the Objectors Carda pursuant to the adjudication process.
- (3) Copies of Notices of Water Rights that are claimed to evidence the Objectors Carda water rights.
- (4) A photograph of a portion of Objectors Carda's diversion means at the source of supply, Lore Lake, taken on September 8, 1981.
- (5) A photograph of Objectors Carda's irrigation pump at their diversion point on Lore Lake.
- (6) A photograph of the confluence of Little Lost Creek and Lore Lake taken on September 8, 1981.

- (7) A photograph of Objectors Carda's diversion works in relation to the high water marks of Lore Lake taken on September 8, 1981.
- (8) A photograph depicting the water level of Lore Lake in relation to the high water marks thereon taken on September 8, 1981.
- (9) A photograph depicting Lore Lake during the dry year of 1977.
- (10) A photograph of a "sink hole" that has developed in the past in the bed of Little Lost Creek.
- (11) Another photograph of another "sink hole" that formerly developed in the bed of Little Lost Creek.
- (12) A letter addressed to the Objectors Carda from the Flathead Conservation District relating to these Objectors' efforts to alleviate the losses in Lost Creek to groundwater sources.

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All of Objectors Carda's exhibits were received into the record without objection.

The Department of Natural Resources and Conservation offered into the record five (5) exhibits on its own behalf, to-wit:

- (1) A memorandum by Jim Rehbein, an employee of the Department, relating to his inspection of the proposed place of use, together with various maps and supporting data.
- (2) A copy of a computer printout secured from the Department depicting water right claims on the source of supply. The red markings thereon

indicate those rights relating to the Lost Creek supply.

- (3) An update of a computer printout of the Department depicting in red various water right claims involving the source of supply.
- (4) A data sheet reflecting computations on estimated water requirements for Applicant's proposed use executed by Charles Brasen.
- (5) A summary of readings from a staff gage located at Lore Lake and maintained by the Montana Department of Fish, Wildlife and Parks.

All the Department's exhibits were received into the record without objection.

The Hearing Examiner, after considering the evidence herein, and now being fully advised in the premises, does hereby make these Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Applicant herein does not in fact presently intend to appropriate 160 gallons per minute up to 55.1 acre feet per year. That amount was predicated on anticipated cultivation of 22 acres more or less. Applicant now intends to irrigate only some five

(5) acres more or less, and to divert sufficient water for several head of cattle.

2. Applicant intends to use the waters claimed herein no earlier than April 15 of any given and no later than October 15 of any given year. Applicant intends to divert for stock water purposes continuously as needed throughout the year.

3. Applicant's proposed place of use is comprised of five (5) acres more or less located in the SW1/4 of Section 36, Township 30 North, Range 23 West, all in Flathead County.

4. Applicant intends to divert the waters claimed herein from Lost Creek at a point in the NE1/4 SW1/4 of Section 36, Township 30 North, Range 23 West, all in Flathead County.

5. The Applicant's proposed use of cultivating alfalfa and/or grain crops is a beneficial one as it would be of material benefit to the Applicant, and as the cultivation of these crops would not be possible without the use of such waters.

Applicant's intended use of the water for stock-watering purposes is also a beneficial one.

6. The use of the total claim of 55 acre-feet for the irrigation of five (5) acres reflects an unreasonable quantity of water and would result in the waste of the water resource. Based on the probable soil conditions, the water demands of alfalfa, and the location of Applicant's property, no more than 10 acre feet could be reasonably used for the cultivation of such acreage. A tenth (0.1) of an acre foot of water for several cattle is a reasonable estimate of their water requirements.

7. Applicant's proposed means of diversion are adequate. Although the Applicant appears uncertain as to the precise particulars, a sprinkler irrigation system will be utilized. Such systems are amongst the most efficient means of applying water for irrigation purposes, and little water will be lost in conveyance.

8. The source of supply drains some 24 square miles. Said waters demonstrate substantial ground water interaction, as "sink holes" often appear in the bed of this water course and as springs are characteristic of substantial portions.

9. The Objectors Carda divert water from Lore Lake (also known as Lauri Lake). Little Lost Creek is hydraulically connected with this impoundment.

10. It cannot be said on this record that the waters claimed herein by the Applicant would not in the ordinary course of events serve to augment the source of waters in Lore Lake either by direct accretions to Little Lost Creek flow, or by seepage through the geological underlay in the form of groundwater percolation, or by the saturation of the geologic underlay so as to provide a hydrostatic head for surface stream runoff.

11. The Objectors Carda irrigate approximately 270 acres from the waters accruing to Lore Lake. Said waters are also utilized for stock-watering purposes. Approximately 140 acres of the aforesaid total place of use is devoted by the Cardas to small grain crops. Approximately 40 more acres is consistently cultivated in alfalfa hay. Around 80 acres is consistently utilized for pasture purposes.

12. The Objectors Carda use waters of Lore Lake substantially during the same time frame requested by the Applicant herein. However, the irrigation of the lands devoted to grains is substantially complete by the middle of summer in any given year.

13. There are unappropriated waters in the amount the Applicant seeks throughout the time period during which Applicant requests the use of the waters claimed herein. Moreover, such unappropriated waters exist at the times that Applicant put them to the use proposed by the Application in this matter.

14. On relatively rare occasions in unusually dry years, there will not be sufficient surplus waters available for Applicant's use.

15. The water uses of the Objectors Carda will not be adversely affected by the granting of this Application as limited herein.

16. The Applicant does not intend nor claim the right to appropriate more than 10,000 acre-feet as a volumetric~~x~~ measure nor more than 15 cubic feet per second as a flow measure.

17. The Application was duly and regularly filed with the Department of Natural Resources and Conservation on September 25 of 1979, at 11:33 a.m.

CONCLUSIONS OF LAW

1. MCA 85-2-311 (1981 amend.) directs the Department to

issue a water use permit so long as the following conditions are met by the Applicant:

- (1) there are unappropriated waters in the source of supply:
 - (a) at times when the water can be put to the use proposed by the applicant;
 - (b) in the amount the applicant seeks to appropriate; and
 - (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (2) the rights of a prior appropriator will not be adversely affected;
- (3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (4) the proposed use of water is a beneficial use;
- (5) the proposed use will not interfere unreasonably with other planned uses or developments for which the permit has been issued or for which water has been reserved;
- (6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;
- (7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

Although the present Application was filed with the Department when the precursor to the above-cited statute was in effect, the minor language changes made by the 1981 legislature merely clarify former legislative intent by making explicit what was formerly implicit. No prejudice accrues to the Applicant by testing the merits of the present Application against the benchmarks of the new statutory provision.

2. Applicant is without a bona fide intent to appropriate 55.1 acre-feet per year. Such an intention is a prerequisite for an appropriative claim. See generally Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900); see also, MCA 85-2-310(3) (1979), ("The Department may cease action upon an application for a permit or return it to the applicant when it finds the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use.") Waters can be reserved for future beneficial uses only by governmental entities or subdivisions thereof. MCA 85-2-316 (1979).

3. The Applicant intends to appropriate ³⁵160 gallons per minute up to that quantity required for the successful irrigation of approximately 5 acres of land. The Applicant also intends to secure up to .1 acre-feet per year for stock-watering purposes. The source of supply of these waters will be Lost Creek at a point in the NE1/4 SW1/4 SW1/4 of Section 36, Township 30 North, Range 23 West, all in Flathead County. The Applicant's place of use will be located in the SW1/4 of Section 36, Township 30 North, Range 23 West.

4. Applicant's proposed uses find themselves within that class of uses that are regarded as being beneficial. See MCA 85-2-102(2) (1979). However, the use of 55 acre-feet per year for the irrigation of a five-acre tract is an unreasonable quantity of water and would result in the waste of the water resource. See Woodward v. Perkins, 116 Mont. 46, 147 P.2d 1016 (1944). Based on soil conditions, the proposed crops, the location of the Applicant's place of use, and the prevailing climate, 10 acre-

feet per year is the greatest quantity of water that is reasonably required for the irrigation of Applicant's five-acre tract. See generally Sayre v. Johnson, 33 Mont. 15, 81 P. 389 (1905). The use of a tenth (0.1) of an acre foot of water per year for several head of cattle is reasonable.

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5. The priority date for this permit shall be September 25, 1979, at 11:33 a.m. This is the date and time at which the application was duly filed with the Department of Natural Resources and Conservation. See MCA 85-2-401(2) (1979).

6. The Applicant's proposed means of diversion are adequate and reasonable. Applicant proposes to use a sprinkler type irrigation system, with the water to be conveyed to the place of use by means of a pipeline and pump. A sprinkler irrigation system is amongst the most efficient means of applying water for agricultural uses. Applicant's diversion scheme is customary for his proposed purposes, and it will not result in the waste of the water resource.

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7. The Applicant herein does not intend nor does he claim the right to divert a volumetric measure of 10,000 acre feet or a flow rate of 15 cubic feet per second. Therefore, it is not incumbent upon the Applicant to prove by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected. However, it is incumbent upon the Applicant to demonstrate the existence of the statutory criteria by substantial credible evidence. MCA 85-2-311(7) (1981 amend.).

8. There are generally unappropriated waters in the source of supply during such times as Applicant seeks the use of the

water and at such times that such waters can be put to the uses proposed by the Applicant. It is true that the record reflects that in extremely dry years there will be no surplus waters available for the Applicant. However, the evidence shows that these dry years have occurred only on relatively rare occasions.

The existence of unappropriated water for the dispositions of permit applications cannot be measured based on the driest years on record. The inevitable consequence of such an approach is to sanction the waste of vast quantities of this state's water resources. That result is in direct derogation of the fundamental policies and purposes of the Montana Water Use act.

"It is the policy of this state and a purpose of this chapter to encourage the wise use of this state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of this state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems...." MCA 85-2-101(3) (1979).

Moreover, an existing water user is entitled to only that amount that is reasonably required for the purposes of his appropriation. Denying applications based on the unavailability of surplus waters in the driest years on record would in effect allow such existing appropriators to control vast quantities of excess waters in the stream systems in this state merely to extract a smaller portion thereof in substantially every year. This cannot be condoned in view of this state's insistence upon the beneficial use of the water resource.

"One should not be permitted to play the dog in the manger with water he does not or cannot use for beneficial purposes when other lands are crying for

water. It is to the interest of the public that every acre of land in this state susceptible to irrigation shall be irrigated." Allen v. Petrick, 69 Mont. 373, 379, 222 P. 451 (1922).

Equally, one could not paralyze the development of unused portions of a stream system merely to protect oneself against potential interferences in dry years.

9. The Application as limited herein will not adversely affect prior appropriators. The record reflects that there will be some years in which Applicant's diversions may capture waters required by the Objectors Carda. However, Applicant's use herein will necessarily be subordinate to the Objectors Carda's prior claims. The fundamental and bare-boned aspects of Montana's appropriation system remains "first in time, first in right." MCA 85-2-401(1) (1979). The first to apply waters to beneficial uses is to the protection of those uses against all subsequent appropriators. Thus, the Applicant herein must cease using or diverting the water provided for by this order to the extent necessary to provide the Objectors Carda with the full measure of their water needs at any given time. The record does not reflect any other feasible means of conditioning this present permit in order to protect the Objectors Carda's rights. Should the Applicant herein transgress the fundamental rule of priority, the Objectors will have their claims for damages resulting therefrom and for injunctions against such further encroachments. See Tucker v. Missoula Light and Ry. Co., 77 Mont. 91, 250 P. 11 (1926). Such interferences may also result in the revocation of this permit. See MCA 85-2-314 (1979).

Based on these proposed Findings of Fact and Conclusions of Law, the Hearing Examiner hereby issues the following proposed Order.

ORDER

Subject to the terms, restrictions, and limitations described below, Application For Beneficial Water Use Permit No. 24668-76LJ is hereby granted to Charles D. Hammell to appropriate 160 gallons per minute up to 10 acre-feet per year for new sprinkler irrigation of five (5) acres more or less located in Section 36, Township 30 North, Range 23 West, all in Flathead County, and up to one-tenth (0.1) of an acre foot for stock-watering purposes. In no event shall Applicant cause waters to be diverted for irrigation purposes pursuant to the permit to be issued in this matter prior to April 15 of any year or subsequent to October 15 of any year. Diversions for stock-watering purposes may be made throughout the year. The source of supply shall be Lost Creek at a point in the NE1/4 SW1/4 SW1/4 of Section 36, Township 30 North, Range 23 West, all in Flathead County. The priority date for this permit shall be September 25, 1979, at 11:33 a.m.

This permit is hereby made expressly subject to the following conditions, restrictions, and limitations.

- (a) The right evidenced by this permit is subject to all prior and existing rights and any final determination of those rights made pursuant to Montana Law. Nothing herein shall be construed to authorize permittee to use water to the detriment to any degree of any senior appropriator, including but not by way of limitation the Objectors Carda.
- (b) Nothing herein shall be construed to affect or reduce the Permittee's liability for damages which

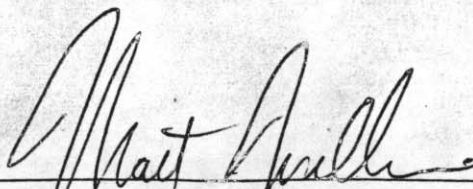
may be caused by the exercise of this permit. Nor does the Department in issuing this permit acknowledge any liability for any damages caused by the exercise of this permit, even if such damage is the unavoidable and necessary consequence of diversions made pursuant hereto.

- (c) Permittee shall in no event cause to be diverted from the source of supply pursuant to this permit more water than is reasonably required for the above-described purposes. At all times when water is not reasonably required for these purposes, permittee shall cause and otherwise allow the waters to remain in the source of supply.
- (d) The Permittee shall diligently adhere to the terms and conditions of this Order. Failure to adhere to these terms and conditions may result in the revocation of this permit.
- (e) The Permittee shall proceed with reasonable diligence in the completion of his appropriation as provided herein.
- (f) The Department may require the Permittee in the exercise of reasonable discretion to install metering devices on his pump such that the rate and volume of water withdrawn pursuant to this permit may be measured. The Department may also require the Permittee to compile and maintain written records of the measurements of his diversions.

NOTICE

This Proposed Order is offered for the review and comment of all parties of record. Objections and exceptions to this Proposed Order shall be filed with and received by the Department on or before October 30, 1981.

The Department's Final Order will be sent to all parties by certified mail.



Matt Williams, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59601
(406) 449 - 3962

CASE # 24668